IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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MOLLY and MARIO ANDRADA for THE ESTATE OF VERONICA GUTIERREZ, and DIANE and PATRICK CHAVEZ for THE ESTATE OF DENISE CHAVEZ and for THE ESTATE OF JAY LYNN RODARTE,

Plaintiffs,

vs. No. CIV-05- 843 WJ/WPL

LUIS B. JUAREZ for THE ESTATE OF CHRIS RODARTE, RONALD MCDOUGALL, MATTHEW MCDOUGALL, and PLAINS TRANSPORTATION, INC.,

Defendants.

NOTICE OF REMOVAL TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

TO: UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

COMES NOW Defendant, Plains Transportation, Inc. (hereinafter "Plains"), by and through its attorneys of record, Butt Thornton & Baehr PC (Paul T. Yarbrough), and as grounds for removal to this Court, states as follows:

1. Plaintiffs filed the original civil action against Plains in the Fourth Judicial District Court, County of San Miguel, State of New Mexico, on December 3, 2004. The case was docketed as San Miguel County Cause No. CV 2004-492.

2. In lieu of an Answer, Plains filed a Motion for More Definite Statement that was granted on July 20, 2005. Plaintiffs filed and served an Amended Complaint for Wrongful Death and Personal Injuries on July 21, 2005.

3. The Plaintiffs Veronica Gutierrez, Denise Chavez and Jay Lynn Rodarte were all killed in the accident that is the subject of this matter. They were citizens of New Mexico. See Amended Complaint at ¶¶ 2 and 4.

4. Molly and Mario Andrada are the personal representatives of Veronica Gutierrez and they are citizens of New Mexico pursuant to 28 U.S.C. § 1332(c)(2). See Amended Complaint at ¶¶ 1 and 2.

5. Diane and Patrick Chavez are the personal representatives of Denise Chavez and Jay Lynn Rodarte and they are citizens of New Mexico pursuant to 28 U.S.C. § 1332(c)(2). See Amended Complaint at ¶¶ 3 and 4.

6. Defendant Ronald McDougall at all material times was and is currently a citizen of Texas. See Amended Complaint at ¶ 6.

7. Defendant Matthew McDougall at all material times was and is currently a citizen of Texas. See Amended Complaint at ¶ 6.

8. Plains is a foreign corporation incorporated under the laws of the State of Texas, with its principal place of business in Texas, and is a citizen of the State of Texas for purposes of determining diversity of citizenship under 28 U.S.C. § 1332. See Amended Complaint at ¶ 7.

9. Complete diversity of citizenship exists between Plaintiffs and the Defendants Plains, Ronald McDougall and Matthew McDougall.

10. In the Amended Complaint, Plaintiffs also join as a Co-Defendant Chris Rodarte, who was the driver of their vehicle and was also killed in the accident. On information and belief, Chris Rodarte was a citizen of New Mexico.

11. The personal representative for Chris Rodarte, Luis Juarez, is a citizen of New Mexico pursuant to 28 U.S.C. § 1332(c)(2). See Amended Complaint at ¶ 5.

12. In removal actions, positions as plaintiffs and defendants are based on real interests and not parties' characterization. *See Kenko Intern., Inc. v. Asolo S.r.l.*, 838 F.Supp. 503, 505 (10th Cir. 1993). The parties' characterization in formal pleadings is not conclusive. *Id.* Instead, in determining alignment, the Court must look to the facts in existence at the time the action was commenced. *Id.*

13. Thus, in this case, the Court should look to the pleadings at the time of removal to determine whether Rodarte or his Estate is properly aligned as a defendant. *Id.*

14. In this case, Plaintiffs' Amended Complaint sets forth that Chris Rodarte acted reasonably under the circumstances. See Amended Complaint at ¶ 25. Plaintiffs make no allegations of wrongdoing or misconduct on the part of Chris Rodarte. Further, Luis Juarez has been appointed as personal representative of Chris Rodarte's Estate to pursue claims against the Plains Defendants. Mr. Rodarte's Cross Complaint is devoid of allegations against the Plaintiffs. It is clear that the claims of Chris Rodarte and his Estate are not adverse to Plaintiffs and should be realigned by the Court as a Plaintiff in this case.

15. On this basis, complete diversity exists between the Plaintiffs and Defendants in this matter.

16. The Amended Complaint, pursuant to the New Mexico Rules of Civil Procedure, contains no allegation for damages in a specific monetary amount. The Complaint, however, alleges that Plaintiffs' decedents were killed as a result of the negligence of Plains and its drivers. See Amended Complaint at ¶¶ 2 and 4.

17. Plains does not admit that Plaintiffs' decedents were killed or damaged in any amount by any act, omission, or negligence of Plains or its drivers. However, based on the

allegations that the three Plaintiffs' decedents and Cross-Claimant's decedent were killed in the Amended Complaint, the amount in controversy exceeds $75,000.00.

18. In the alternative, because Chris Rodarte was fraudulently joined, his appearance as a Co-Defendant should not be considered for purposes of diversity jurisdiction. A party is considered fraudulently joined and removal permitted when the plaintiff has not or cannot state a claim for relief against that entity or does not intend to secure a judgment against that particular defendant. 14B Charles A.Wright and Arthur R. Miller, *Federal Practice and Procedure*, § 3723, p. 631-32; *Dodd v. Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964). Upon allegations of fraudulent joinder, the Court may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available. *Smoot v. Chicago, Rock Island and Pacific R.R. Co.*, 378 F.2d 879, 881-82 (10th Cir. 1967).

19. Plaintiffs allege that Chris Rodarte acted reasonably under the circumstances. See Amended Complaint at ¶ 25. Plaintiffs allege no misconduct on the part of Chris Rodarte. Accordingly, they have not and cannot state a claim against him for negligence and his presence in this lawsuit should be disregarded for diversity purposes. *Couch v. Astec Industries, Inc.*, 71 F.Supp.2d 1145 (D.N.M. 1999).

20. Further, this Court has pendent jurisdiction over the Estate of Chris Rodarte's Cross Claim against Plains and its drivers resulting from the accident that is the subject of this matter under 28 U.S.C. § 1367.

21. Also, complete diversity exists between Plains and its drivers and Chris Rodarte as a Cross-Claimant. Based on the allegations that Chris Rodarte was killed in the accident giving rise to this matter, the amount in controversy on his Cross-Claim also exceeds $75,000.00. See Cross Claim of Chris Rodarte at ¶ 9.

22. All parties required to join in this Removal have joined or have not been served or noticed in accord with 28 U.S.C. § 1446.

23. As Chris Rodarte should actually be realigned by the Court as a Plaintiff or was fraudulently joined, his consent to this removal is not necessary.

24. Accordingly, the Amended Complaint is a civil action over which this Court has jurisdiction pursuant to 28 U.S.C. § 1332, and which is removable by Plains under the provisions of 28 U.S.C. § 1441, in that:

(a) The matter in controversy exceeds the sum or value of $75,000.00 exclusive of interest and costs, and

(b) The matter in controversy is between citizens of different states.

25. In accordance with 28 U.S.C. § 1446(a), copies of all process, pleadings and orders served upon Plains in San Miguel County Cause No. CV 2004-492 have been attached to this Notice as Exhibits A through HH.

26. This Notice of Removal is timely filed with this Court within thirty (30) days after service of Plaintiffs' Amended Complaint, which is the first pleading from which Plains could first ascertain that the case was removable pursuant to 28 U.S.C. § 1446(b) and thus making the case subject to diversity jurisdiction.

27. This matter is filed within one year of the commencement of the action pursuant to 28 U.S.C. § 1446(b).

28. Plains, immediately upon the filing of this Notice of Removal, gave written notice of the filing to Plaintiffs as required by 28 U.S.C. § 1446(d) and filed a copy of this Notice of Removal with the Clerk of the Fourth Judicial District Court, County of San Miguel, State of New Mexico, the Court from which this action is removed.

WHEREFORE, Defendant Plains Transportation prays that the above-entitled action be removed from the Fourth Judicial District Court, County of San Miguel, State of New Mexico, to this United States District Court for the District of New Mexico.

Respectfully submitted,

BUTT THORNTON & BAEHR PC

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I hereby certify that a true copy of the foregoing Notice of Removal was mailed to all counsel of record this 4th day of August, 2005.

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RAUL P. SEDILLO

ENDORSED
FILED IN MY OFFICE THIS
2004 DEC -3 PM 4:06
MACIE DOMINGUEZ ROGERS
COURT ADMINISTRATOR

STATE OF NEW MEXICO
COUNTY OF SAN MIGUEL
FOURTH JUDICIAL DISTRICT COURT

MOLLY and MARIO ANDRADA for THE ESTATE OF VERONICA GUTIERREZ, and DIANE and PATRICK CHAVEZ for THE ESTATE OF DENISE CHAVEZ and for THE ESTATE OF JAY LYNN RODARTE,

Plaintiffs,

v. No. CV-2004-492

CHRIS RODARTE, RONALD MCDOUGALL, JOHN DOE TRUCKDRIVER, and PLAINS TRANSPORTATION, INC.,

JAY G. HARRIS

Defendants.

COMPLAINT
FOR WRONGFUL DEATH AND PERSONAL INJURIES

Plaintiffs state:

1. Plaintiffs Molly and Mario Andrada are residents of Santa Rosa, New Mexico.

2. Veronica Gutierrez was also a resident of Santa Rosa, New Mexico at the time of her death.

3. Veronica was Molly Andrada's sister. Veronica died leaving three minor children, Jason and Jackie Gutierrez, ages 16, and Jessica Gutierrez, age 17. Molly and Mario Andrada are in the process of seeking appointment as Guardians and Conservators for the three minor children.

4. Diane and Patrick Chavez are residents of Santa Rosa, New Mexico.

5. Denise Chavez was a resident of Santa Rosa, New Mexico at the time of her death.

DEFENDANT'S
EXHIBIT
A

6. Denise was the daughter of Diane and Patrick Chavez. Denise had four children, Christian Chavez, Derrick Chavez, Jay Lynn Rodarte and Christopher Rodarte, Jr.. Jay Lynn Rodarte died in the crash that is the subject of this Complaint. Diane and Patrick are in the process of seeking appointment as Guardians and Conservators for the other three minor children.

7. Chris Rodarte was also a resident of Santa Rosa at the time of his death.

8. Ronald McDougall, on information and belief, is a Texas resident residing near Canyon, Texas.

9. John Doe Truckdriver, on information and belief, is also a Texas resident and is the grandson of Ronald McDougall.

10. Plains Transportation, Inc., on information and belief, is a foreign motor carrier corporation headquartered in Texas and doing business in New Mexico.

11. The acts and omissions complained of herein occurred northwest of Santa Rosa, New Mexico on US 84.

12. Plaintiffs' decedents were involved in an accident on November 8, 2004, in which defendants were negligent and which negligence of defendants was a proximate cause of Plaintiffs' decedents' injuries and deaths.

13. At the time of the accident Defendants Ronald McDougall and John Doe Truckdriver were employed by Defendant Plains Transportation, Inc., were driving tractor trailers owned by Defendant Plains Transportation, Inc., and were acting within the course and scope of their employment.

14. Defendant Plains as employer of Defendants Ronald McDougall and John Doe Truckdriver is liable for any and all damages that resulted from the negligence of Defendants Ronald McDougall and John Doe Truckdriver.

15. Defendant Plains had an obligation to the public to hire, train, retain, and supervise safe and competent drivers, and Defendant Plains is liable for any and all damages that resulted from the negligence in its hiring, training, retaining, or supervision of its employees.

WHEREFORE, Plaintiffs request monetary damages against Defendants, in amounts to be fixed by the trier of fact to be just and reasonable, for court costs and for all other appropriate relief.

Respectfully submitted,

GADDY LAW FIRM

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(505) 254-9366 Fax

Attorneys for Plaintiffs

THE EXHIBITS ATTACHED TO THIS

PLEADING ARE TOO VOLUMINOUS

TO SCAN.. SAID EXHIBITS ARE

ATTACHED TO THE ORIGINAL

PLEADING IN THE CASE FILE WHICH

IS LOCATED IN :

THE RECORDS DEPARTMENT
CLERK'S OFFICE
U.S. DISTRICT COURT......